

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
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<b>Rules and Regulations Implementing the</b>	)	CG Docket No. 02-278
<b>Telephone Consumer Protection Act of</b>	)	
<b>1991</b>	)	

**EMERGENCY REQUEST OF ADVAL COMMUNICATIONS, INC.  
FOR STAY OF FACSIMILE ADVERTISEMENT RULES**

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August 18, 2003

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CG Docket No. 02-278

**REQUEST FOR STAY  
OF FACSIMILE ADVERTISEMENT RULES  
SUBMITTED BY  
ADVAL COMMUNICATIONS, INC.**

**SUMMARY OF RELIEF**

ADVAL Communications, Inc., (the "Petitioner" or "ADVAL") asks for an emergency stay for itself and its customers of the rules that apply to unsolicited commercial facsimiles adopted in the above-captioned proceeding, including 47 C.F.R. §§ 64.1200(a)(3) and 68.318. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (rel. July 3, 2003) ("*Report and Order*"). These new rules were published in the *Federal Register* on July 25, 2003, and are scheduled to become effective on August 25, 2003. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144 (2003). The Petitioner has approximately 2000 corporate customers of which approximately 450 send fax messages to their customers *every month* through ADVAL's facility. It is impossible for Adval and its customers to comply with the written consent requirement in time and, as a result, the new rules threaten

the viability of ADVAL's business. Without an immediate stay of the rules, ADVAL may be forced to discontinue its current operations.<sup>1</sup>

In addition to an immediate, emergency stay, the Petitioner respectfully requests that the Commission extend the effective date of paragraphs 187 to 203, and associated rules adopted in the *Report and Order* for a minimum of 12 months so that regulatory compliance, feasibility, technological and business problems created by the new rules can be addressed to the extent possible. The Petitioner also asks the Commission to take such other actions as are consistent with this Request for Stay.

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<sup>1</sup> ADVAL provides enhanced messaging and communications services to customers to satisfy a range of demanding information distribution needs. ADVAL provides mission critical communications services to a variety of vertical industries, including the travel, financial and publishing marketplaces. Adval filed reply comments in Docket 02-278 on January 31, 2003.

## I. REASONS FOR REQUEST FOR STAY

The Petitioner and its customers will suffer irreparable damage because the Commission's *Report and Order* suddenly and unexpectedly has taken away the "established business relationship" ("EBR") exemption which, for over a decade, has permitted the Petitioner's customers to send promotional materials to their customers. This drastic and unjustified change in the Commission's interpretation of what constitutes "prior express permission or consent" under the facsimile portions of the Telephone Consumer Protection Act of 1991 ("TCPA") does not provide Petitioner or its customers sufficient time to comply with the drastically altered rule within the effective date. In addition, the *Report and Order* creates overwhelming financial, administrative and technical burdens for ADVAL and its customers. The new EBR definition is, in fact, an implementation nightmare for the legitimate users of fax messaging. As set forth in this Request for Stay, it will take considerable time to test the "feasibility" of compliance with the new fax rules because ADVAL cannot yet determine from its customers whether the customers will subscribe to an opt-in database in such sufficient numbers to make this approach feasible.

Assuming customers are willing to continue to use fax messaging and seek to obtain the required written consents, many additional steps will be required for ADVAL and its customers to become compliant, and such compliance cannot be accomplished under the current deadline. For instance, ADVAL needs to determine if its customers will commit the capital / technical resources to comply or if they will simply stop contacting their customers and opt for direct mail or other, more expensive ways to contact their customers. *If the latter course is taken, simply put, ADVAL will be forced to close its doors and go out of business.* However, if ADVAL's customers decide to build and maintain opt-in databases, there will be a considerable amount of

time needed to execute a technology plan that comports with the new rules for the affected clients. ADVAL cannot accomplish the necessary advance steps prior to the current effective date.

Rather, ADVAL will need a minimum of one year to comply with the new fax rules. The request for time is based on the enormity of the task ahead. In order to comply, ADVAL and its customers, will have to set up hundreds of separate opt-in databases. The task is enormous. To use just a single example, Adval provides services to a large number of travel suppliers and a separate database will be necessary for each such travel supplier to comply. It will be necessary to develop software to administer and update these databases. Multiply this by the large number of other legitimate users of commercial facsimile services and one can only conclude that the task will be impossible to accomplish on time. ADVAL's customers have told ADVAL that there is no way that they would be able to comply in the short term and that some regulatory relief would be needed to cover this situation.

## **II. THIS REQUEST MEETS THE COMMISSION'S STANDARDS FOR GRANTING A STAY**

The Commission generally considers four factors in ruling on requests for stays, namely: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary injunctive relief; (3) the degree of injury to other parties if relief is not granted; and (4) the fact that the issuance of the order will further the public interest.<sup>2</sup> ADVAL's Request for Stay meets these standards.

First, ADVAL intends to file a petition for reconsideration that will likely succeed on its merits. There are several fatal flaws to the Commission's new fax rules adopted in the *Report and Order*. One such flaw is the Commission's failure to comply with the Regulatory Flexibility

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<sup>2</sup> See, e.g., *In re AT&T Corp.*, 13 FCC Rod. 14508 (1998).

Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), which requires that the FCC analyze the potential impacts of new rules on small businesses. ADVAL is a small business with 28 employees.

As will be set forth in ADVAL's petition for reconsideration, and as was recently articulated by the Office of Advocacy of the United States Small Business Administration ("SBA"), the *Report and Order* fails to satisfy the requirements of the RFA by, among other flaws, not accounting for the costs that the rule will impose upon small businesses, small trade associations, membership organizations, and small non-profit organizations.<sup>3</sup> The SBA asserts that the cost for obtaining the new, necessary written consent for faxes will be substantial and ADVAL concurs in this assessment.

There are two parties affected by the *Report and Order*: businesses who send faxes to their customers that contain messages that could be defined as marketing or advertising related; and the fax messaging companies who have made significant investments in messaging platform technology to send these messages for or integrate with the companies that send these messages. The *Report and Order* does not analyze the financial impact on these parties.

The revenue that fax senders provide to the fax messaging industry will grind to a halt once the new fax rules become effective. Several of our customers have told us they do not have the technology or personnel to comply with the *Report and Order*. They do not have the resources to create direct mail campaigns, to hire personnel to build and administer and opt-in databases in the time frame allocated. Some of our customers could modify their contracts or renewals to include permission to fax but this too takes a long cycle of time. However, time is only one component. The logistics and expense are beyond the capabilities of small businesses.

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<sup>3</sup> See *Ex Parte* Letter submitted by the Office of Advocacy to Chairman Powell, Aug. 14, 2003 ("SBA Letter") at 4.

The FCC and FTC considered these impacts on small businesses when addressing the telemarketing and voice broadcasting sectors of the new telemarketing rules but the Commission did not consider this issue in its RFA consideration as it relates to the fax provisions.

Moreover, the *Report and Order* contravenes the Administrative Procedures Act ("APA") and the First Amendment. The deletion of the longstanding EBR without sufficient notice is but one example of the APA violations in the *Report and Order*.

As to the second factor in determining whether a stay should be granted, irreparable harm, ADVAL's business is already being harmed due to the "chill" on commercial facsimile uses that the publication of the *Report and Order* already has caused. If ADVAL's customers continue to stop using ADVAL's services because of the new rule requirements, ADVAL will be forced out of business. ADVAL's customers, who focus on business-to-business transactions, will be forced to alter their communications between themselves and their contacts, thereby irreparably altering business relationships and resulting in less efficient communications. As documented by several other parties in this proceeding, many businesses, trade associations, and membership organizations rely upon faxes to communicate with their customers and members. As the SBA recently stated, the "Both the Order as a whole and the 'do not fax' provisions have the potential to cost million of dollars in lost business opportunities, as well as disrupting the communications of trade associations and membership organizations."<sup>4</sup>

Moreover, ADVAL has contracts with its customers that guarantee that ADVAL will send facsimiles for them during the contract period and many customers have contracts with ADVAL that state they will send facsimile through ADVAL's system. Some of these contracts have commitments of certain volume or dollar amounts. ADVAL's standard contract is a one-

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<sup>4</sup> SBA Letter at 3.

year contract. The Commission's order will put ADVAL in violation of some of these contracts and also put some of their customers in violation of their commitments to ADVAL.

Third, a stay of the fax rules will not significantly harm other parties. The TCPA and existing Commission rules already prohibit the sending of unsolicited facsimile advertisements, and the Commission retains its enforcement authority in this area. The main thrust of a stay of the new rules would be to permit businesses to communicate with their existing customers by sending promotional materials during the period of a stay. In this instance, any business, person or other entity could still assert that they did not wish to receive such materials and the sender would be required under the TCPA and the Commission's rules to cease sending such faxes. In essence, the EBR would have been terminated in such instance. Thus, this is not a situation where a stay would cause harm to other parties, since the existing laws and Commission regulations and interpretations would protect the public and preserve the *status quo* while the Commission reviews the outstanding issues raised by various petitions for reconsideration that will be filed in this docket, and while ADVAL and other affected parties explore compliance mechanisms.

Fourth, the public interest supports granting a stay of new fax rules. As ADVAL can attest, and several other stay requests have documented, including the Request for Stay filed by the Chamber of Commerce of the United States of America, immediate enforcement of the new fax rules will interfere with longstanding business communications. The EBR was established Commission policy for well over a decade and ADVAL's clients have relied on that policy in communicating with their customers via facsimiles. ADVAL and its customers face a impossible task of obtaining necessary signatures in the short time frame the Commission has set forth. When considered in the context of the fact that the public is already protected from



unsolicited facsimile advertisements under existing law, and that the new rules change without sufficient notice the longstanding EBR policy, a stay is not only warranted, it is a necessity.

### III. CONCLUSION

Wherefore, in consideration of the foregoing, ADVAL respectfully requests that the Commission issue an immediate Stay and delay the effectiveness of the fax messaging portions of the *Report and Order* for at least 12 months so that the outstanding legal, technological and compliance issues may be considered. In addition, the public interest will be furthered by allowing businesses sufficient time to obtain the necessary consents should the written consent requirements be retained.

Respectfully submitted,

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